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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 717

LOUISVILLE JOINT STOCK LAND BANK,

Petitioner,

vs.

WILLIAM W. RADFORD, SR.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

Analysis of the Frazier-Lemke Act.

In construing section 75 of the Bankruptcy Act of 1898, including subsection (s), the Frazier-Lemke amendment, the Court must be guided by the language of the Act, and not by the overzealous statements of counsel, who read something into the Act that is not there. As an Act of Congress, it is entitled to the greatest respect and the most careful and painstaking consideration by this Court. It is presumed to be constitutional. The burden of proof rests upon those assailing its constitutionality. If the Act is susceptible of two constructions, one constitutional and the other unconstitutional, then it is the duty of the Court to hold it constitutional.

This Act must not be confused with State acts. It is an Act passed by the Congress of the United States on the subject of bankruptcy—passed under the grant of power given it by the Federal Constitution. "Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcy throughout the United States", and "to make all laws which will be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof." U. S. Constitution, Art. I, par. 8. On the subject of bankruptcy, the Constitution vests full and complete, not only partial, legislative power in Congress. There is no limitation on this power, save and except such as may be found in the Fifth Amendment. "No person shall * * * be deprived of life, liberty or property without due process of law". It is conceded by all that a person may be deprived of his life, liberty or property by due process of law. The question is: What is "without due process"? No final definition of this has, or perhaps ever will be, given. Generally the courts have, in effect, held that the Act must not be so unwarranted, arbitrary, and unreasonable as to shock one's conscience.

Section 75, including subsection (s), is a part of the Bankruptcy Act of 1898, as amended, and must be construed in conjunction with the entire Act, and not as a complete Act in itself. That was the intention of Congress, and that was the construction it was given by the District Court and Circuit Court of Appeals below, in the case at bar. That is also the construction given Section 75 by Judge Parker, of the Circuit Court of Appeals, Fourth Circuit, in his able and exhaustive opinion, in the case of *William W. Bradford, Jr., Bankrupt*, v. *Michael W. Fahey*, holding Section 75 and subsection (s) constitutional. This

decision was rendered on the very day that the arguments in this Court were completed in the case at bar, and we take the liberty of reproducing the opinion in full in the appendix of this brief, page 15.

The Frazier-Lemke amendment to Section 75 is a bankruptcy statute. No person can take advantage of this Act unless he can qualify as a bankrupt under the definition given by this Court in the *Rock Island* case, and under the definition given by courts generally as to what constitutes bankruptcy. The Act itself states the requirements. "• • • A petition may be filed by any farmer stating that the farmer is insolvent, or unable to meet his debts as they mature." (Subsection c, Section 75.) The Act is further limited to farm debtors. "The term farmer means any individual who is personally *bona fide* engaged primarily in farming operations, or the principal part of whose income is derived from farming operations." (Subsection r, Section 75.) This is substantially the same definition of a farmer given *In re Mackey*, 110 Fed. 355. We submit that this is a proper and legal classification.

Subsection (s) provides that if a farmer debtor is unable to obtain the acceptance of a majority in number and amount of all the creditors to a composition or extension proposal, he may amend his petition or answer *and ask to be adjudged a bankrupt*. It provides for an appraisal of all of the bankrupt farmer's property, whether encumbered or unencumbered, and for the setting aside of his exemptions, subject to any liens thereon. It provides further that the bankrupt farmer may retain possession of part or all of the remainder of his property, and pay for same under the terms and conditions set forth in paragraph 3.

Paragraph 1 of subsection (s) provides that the appraisers shall appraise all of the property of the bankrupt, at its fair and reasonable value, not necessarily the market

value, and that it shall be made in all respects, *with rights of objections, exceptions and appeal according to the Bankruptcy Act;* and that in case of real estate, either party may file objections or exceptions, and appeals, *within one year from the date of the order approving the appraisal.* The appraisers are appointed under the provisions of the Bankruptcy Act, *and are under the control and supervision of the court;* and the creditors have all the rights under subsection (s) that they had prior to this amendment. Surely there is nothing unconstitutional about this.

A careful analysis of this Act will reveal that there is nothing new about it. It is true that it applies well established principles of law in a little different way. It applies the same principles to agriculture that Section 77 applies to the reorganization of railroads. Section 75 of the Bankruptcy Act, as amended by subsection (s), no more restrains, or deals in no more arbitrary manner with creditors, than Section 77 deals with the creditors of railroads. Under both of these Acts, *the property is not sold, or the possession taken away from the owners and given to the creditors, nor are they allowed to bid,* but possession is retained by the debtor, and provisions are made for the creditors to receive the value of the property. Courts of bankruptcy have always used appraisers to establish the value of exempt property. Why cannot these same appraisers be used to establish the value of non-exempt property?

This Court has just held that Section 77 is constitutional. Section 77b, which contains the same principles of law, has just been held constitutional in the case of *Thomas Campbell* v. *Alleghany Corporation,* Circuit Court of Appeals, Fourth Circuit, No. 3831, referred to in our main brief. Surely Congress had the right to extend these principles of law to agriculture, the same as it did to railroads and to

industry. There is no difference in fact between these Acts. As is shown in the Attorney General's opinion, submitted to the Court with this brief, these acts must stand or fall together.

Paragraph 2 of subsection (s) provides that after the bankrupt farmer's exemptions have been set aside to him, subject to existing liens to an amount equal to the value, the possession of all or part of the remainder bankrupt's property shall remain in the bankrupt, under the control of the court, subject to a general lien as security for the payment of the value thereof, to the trustee of the creditors, such liens to be subject and inferior to all prior liens, pledges or encumbrances. The Act provides that such *prior encumbrances shall remain in full force and effect*, and the property covered by such encumbrances shall be subject to the payment of the claims of the secured creditors, holding such liens up to the actual value of such property as fixed by the appraisal. The Act provides further that liens on livestock shall cover all increase, and liens on real estate shall cover all rental received, or crops grown thereon, by the debtor, as security for the payment of any sum that may be due or past due, under the terms and provisions of the Act, until full value of any such particular property has been paid.

The creditors certainly get all the protection that it is humanly possible to give them under existing conditions from a bankrupt estate, except the bankrupt's property. This, Congress has seen fit to withhold, in Section 75, for the benefit of agriculture; in Section 77, for the benefit of railroads; in Section 77b, for the benefit of industry; all for the greater benefit of the people as a whole, for the public good. There is nothing unconstitutional in any of these Acts. Congress has enacted them in its discretion, and that discretion controls, unless it is so clearly unreasonable and unwarranted as to violate the fundamental law.

"This procedure practically compels the creditors to agree to a sale of the property to the debtor at its appraised value and seems to be a most drastic interference with their rights. Nevertheless its constitutionality may be sustained. The debtor has been adjudged a bankrupt. Instead of the usual sale of property by the trustee there is substituted a sale to the debtor at an appraised value, which is not necessarily the current market value, or a retention of the property by the debtor under the moratorium clause, paying an annual rental and with the privilege of purchase. Under existing agricultural conditions, farm property would probably bring much less than its fair value at a forced sale, so that the new procedure is a reasonable regulation for the protection of both debtor and creditors and is within the constitutional power of Congress to legislate on the subject of bankruptcies." Gilbert's Collier on Bankruptcy, (3d Ed.) 1348.

If we read all of subsection (s) together with Section 75 and with the Bankruptcy Act, it is clear that subsection (s), and paragraphs 1 and 2 thereunder, apply to paragraph 7, and that the secured creditors do not lose their liens, and that the unsecured creditors have a general lien on all of the bankrupt's property, save and except his exemptions. In regard to deficiencies to secured creditors, they have the same rights under this section as they had before, under the Bankruptcy Act. They have not been disturbed. More than given in this Act no creditor, secured or unsecured, can get, and more than that he is not entitled to.

Since paragraph 3 was amended by the Committee on the Judiciary of the House, and paragraph 7 added at the committee's request, there is some ambiguity in the language of the Act, but that ambiguity is a question of construction, and not of constitutionality, and the lower courts, with rare exception, have found no difficulty in construing the Act, and carrying out the intent of Congress.

Paragraph 3 of subsection (s) provides that at the request of the debtor, and with the consent of the lienholder or lienholders, the trustee, after the debtor's exemptions have been set aside, shall agree to sell to the debtor any part or parcel or all of the remainder of the bankrupt's estate at the appraised value, upon the terms and conditions therein set forth. It is true that if any secured creditor does not consent to these terms and conditions, that then he will automatically come under paragraph 7. Yet if the provisions of paragraph 3 are reasonable and constitutional, there can be no great objection to paragraph 7, because that is an option given to him in addition to paragraph 3. He need not go under paragraph 7. He can give his consent, or withhold his objection, and then paragraph 3 will control, which we submit is constitutional, and more than reasonable and fair to the creditor.

We come now to paragraph 7. It provides that if any secured creditor of the debtor affected by the Act shall file written objections, then the court, after having set aside the debtor's exemptions, shall stay all proceedings for a period of five years, during which the debtor shall remain in possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession, and that the first payment is to be made within six months. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property, or upon request of any lienholder on real estate, the court shall cause a reappraisal, and the lienholder has his choice, whether he wishes to accept the first or the reappraised price.

Under this paragraph, the court has complete control of the property. It can protect the property from waste. It can charge such rent as is reasonable, and as will protect the creditor, and if the debtor does not comply with

those provisions, the court may order the trustee to sell the property in accordance with the Bankruptcy Act. For a more detailed analysis of paragraph 7, see Judge Parker's opinion in the appendix of this brief, page 15.

Nothing New.

There is no provision in the Frazier-Lemke amendment that the bankruptcy courts of this nation have not already made use of in some cases. The courts have allowed going concerns to continue in business under trustees—they have permitted the payment of indebtedness of such concerns on the installment plan, with or without interest. They have scaled down indebtedness to less than the value of the property, through composition, and they have given extension of time in which payments were to be made, and this at times against the wishes of the minority; and what can be done to a minority can be done to a majority, or to all, and still be constitutional. They have sold encumbered and unencumbered property for cash, or on time. Referees in bankruptcy have sold encumbered and unencumbered property at public and at private sale, at 75% of the appraised value without the approval of the court, and at less than 75% with the approval of the court. The Act here in question prohibits the sale for less than a hundred per cent of the appraised value. Courts have authorized sales to the mortgagee, or to the mortgagor, or to strangers, at private sale and at public sale. All that the Frazier-Lemke amendment does is to make this discretion mandatory, and that is not unconstitutional, although it may be new when this principle is extended to agriculture, the same as it has been practiced and extended by the courts to industry. Gilbert's Collier on Bankruptcy (3d Ed.) 1257, Sec. 1536.

Has Lienholder Right to Bid.

The question has been asked whether a mortgagee or a lienholder had an inherent right to have the property sold at public auction, and a right to bid. Our answer is that he has not. It has been suggested that the secured creditor owned the property which he holds as security. That is not an accurate statement. He does not own the property. It belongs to the debtor. The lienholder or creditor has merely a lien upon the property as security for the payment of the debt. In nearly every State in the Union the mortgagee or lienholder is entitled *not* to the specific property, but to the *proceeds* when same is sold under judicial process. *The Constitution does not require the distribution of the debtor's assets among his creditors.* The creditor has a right to the value of the property to satisfy his security, and that is what he gets under the Frazier-Lemke amendment.

The fact that the lienholder has been permitted to bid, under the rules of a court sitting in equity, is no reason that Congress cannot stop the practice in a bankruptcy proceeding. Under the common law, he never had such a right, and he was not allowed to bid. In England, any party to a proceeding in chancery who desired to bid applied to the court, and obtained leave to do so. Bidding without such leave was generally improper, because the conduct of the proceedings was usually given to some of the parties, and the bidding by any without leave of the court was somewhat analogous to bidding by the officer conducting the sale. (Note 136 A. S. R. 818.)

But in this country, there is no disqualification against a party to the proceeding becoming a bidder, and being accepted as a purchaser. For in as much as a sale made by a special master, under the direction of a court of chancery, is not made by either of the parties to the liti-

gation, or under his direction, but by the court, at such public judicial sale either party as a rule may bid without leave given by the court (*Pewabic Mining Co.* v. *Mason*, 145 U. S. 343; 16 R. C. L. 106, sec. 7716).

The fact that courts in chancery or sitting in equity have permitted mortgagees to bid without leave, while in England such leave was necessary, does not justify the conclusion that in this country they have an inherent right to bid; at least not when the Congress of the United States, legislating under the powers granted it by the Constitution, in connection with the depression, and for the good of the public welfare, sees fit to withdraw that privilege. Congress has a right, and it is its duty, to follow precedent only so far as it throws light upon what ought to be; and that is what has been done in this case. Courts in equity, neither in England nor in America, ever recognized an inherent right in a mortgagee or lienholder in any specific property. His lien may be for the full value, more than the full value, or less than the full value. The fact that the secured creditor, for self-serving purposes, offers to bid the full amount of his lien, and to bid more than the value of the property in order to maliciously deprive the debtor of the benefits of this act, surely will not be looked upon with favor by any court. *He has no such right.*

What If Bankrupt Fails to Purchase.

It has been intimated that the secured creditor may be injured under the provisions of paragraph 7 of subsection (s), if farm values continue to drop, and the land becomes worth less than the appraisal within the five years, and the debtor should refuse to purchase it. Our answer is, that if farm values are going down, they would go down just the same whether the creditor or the debtor has pos-

session of the property, and that the loss would be sustained just the same.

Of course, no law works 100% perfection. Such a law never was passed, and never will be passed. Why should we demand all of these exactions just because we extend to agriculture the same privileges that we extended to railroads under section 77, and to private corporations under section 77b, and to municipalities under section 78? These Acts must be construed together, and must stand or fall together We are confident they will all stand together.

Conclusion.

In construing an act of Congress in relation to the Constitution, the Court must be guided by the reason for, the object and the purpose of, the Act. Section 75 of the Bankruptcy Act will expire within 3½ years. For that reason, it can be classed as temporary and emergency legislation.

When Congress passed Sections 75, including subsection (s), 77 and 77b, and 78, it had a situation, and not a theory to deal with. This nation was confronted by a crisis, and is still confronted by a crisis. There were then some twelve million people out of employment, millions on Federal and State relief, and millions more in want. In many sections, the farmers organized and had recourse to the law of self-preservation, the first law of nature, and actually prohibited foreclosure sales. Officers of the law refused, in some cases, to hold foreclosure sales. State courts, in some instances, told mortgagees that they did not come into a court of equity with clean hands, and that it was not equity to deprive a large number of people of their homes during a crisis. There was no way in which agriculture or business could be refinanced, and there is none today. There are still some twenty or twenty-five million people on Federal relief, and on a disguised dole system. Monthly Report, F. E. R. A.

Congress was not limited to the restriction that a court is, in ascertaining these facts. It has a far wider latitude in the collection and finding of facts than courts, and for that reason, courts always have upheld the acts of Congress, unless they were clearly unreasonable and unwarranted. During the argument, it was asked how the Court could pass upon these questions as a matter of law. That is not necessary. Congress passed upon them as a matter of discretion, and the Court, under our form of Government, is not justified in setting aside that discretion unless it is arbitrary, and unreasonable.

McCulloch v. *Maryland*, 4 Wheat. 316; *Fairbank* v. *U. S.*, 181 U. S. 283.

At the time this legislation was enacted, numerous states were, and some still are, passing moratoriums. That is shown in the record. We call the Court's attention to page 60, appendix B of Petitioner's Brief, in which is given a summary of state mortgage moratorium laws, and there the Court will find a list of 26 States that passed moratorium laws.

Under subsection (s) the farmers who are insolvent or who are in distress and unable to meet their obligations, as they become due, and *therefore bankrupt within the meaning of the Constitution*, will be able to protect and conserve their homes, and their property, and scale down their indebtedness to the fair and reasonable values of such property and pay for same in accordance with the provisions of the amendment.

This amendment is a conservation act. Nobody loses anything—it conserves property and values. The creditors will get the present value of the property—that is all they could get before this amendment or that they are entitled to. In fact they will get more under this amendment than they ever

would get by wrecking another million farm homes and destroying all values. The agricultural wealth of this nation can and will be preserved in the hands of those who created it—the farmers.

Counsel for the bank quote from the Congressional Record, to show that some members were opposed to this Act. They forget, however, that some members who talked against the Act on the grounds that they thought it was unconstitutional were convinced, after the constitutional questions were presented, that they were in error, and have voted for the bill. Counsel also fail to tell us that the same Congressional Record shows that this amendment was passed, after being thoroughly debated, by a standing vote of 113 to 16 in the House and by a roll call vote of 66 to 16 in the Senate. *This vote was the most eloquent part of the debate—it was the climax.* There is, however, plenty of comment on the part of the 113 in the House and the 66 in the Senate in favor of this amendment in the Congressional Record. But we shall not take the Court's time by citing these remarks. *Congress acted and gave its mandate by an overwhelming majority and that mandate is constitutional and is for the best interest of the public. That mandate is humane and it is just to all.* Congressional Record, June 18, 1934, page 12382.

The amendments, Sections 75, 77, 77b and 78, mark a new epoch—from now on the debtor is going to be considered as well as the creditor. The Bankruptcy Act is going to become an act of conservation, and not an act of wreckage. Property and wealth will be conserved in the hands of those who created it—not destroyed. Debtors will be given a reasonable opportunity to make good. There will be some difficulties and perhaps some miscarriage of justice—no law is perfect. Society as a whole will protect itself against unreasonable creditor individuals and corporations. Rea-

sonable creditors will be helped, but the nation as a whole has to carry the burdens of the mistakes of the past and look forward to the future with hope and aspirations for a future that will be just to all.

Respectfully submitted,

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APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 3778.

WILLIAM W. BRADFORD, JR., Bankrupt,

Appellant,

versus

MICHAEL W. FAHEY, Assignee; JOHN D. WORTHINGTON, ANNIE McC. WORTHINGTON and THE POTOMAC JOINT STOCK LAND BANK OF ALEXANDRIA,

Appellees.

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the District of Maryland, at Baltimore.

No. 3797.

WILLIAM W. BRADFORD, JR., Bankrupt,

Appellant,

versus

MICHAEL W. FAHEY, Assignee; JOHN D. WORTHINGTON, and ANNIE McC. WORTHINGTON, His Wife,

Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

Argued January 8, 1935. Decided April 2, 1935.

Before Parker, Northcott and Soper, Circuit Judges.

Morton P. Fisher and Allan H. Fisher (A. Freeborn Brown on brief) for Appellant, and Wade B. Hampton and Clarence E. Martin (Robinson and Fahey on brief)

for Appellees Michael W. Fahey, Assignee, and The Potomac Joint Stock Land Bank of Alexandria; Herbert Levy (Morris Rosenberg on brief) for Appellees John D. Worthington and Annie McC. Worthington, his wife; and Edwin A. Krauthoff as *amicus curiæ*.

PARKER, Circuit Judge:

This is an appeal in bankruptcy proceedings from an order denying the prayer of a petition, which was filed under sub-section (s) of Section 75 of the Bankruptcy Act, and which asked that the court enjoin further prosecution of proceedings which had been commenced in the Circuit Court of Harford County, Maryland, to foreclose a mortgage on the farm of petitioner. The mortgagee resisted the petition on two grounds: (1) that the court of bankruptcy could not interfere with the state court's jurisdiction, which had attached in the proceedings to foreclose the mortgage; and (2) that subsection (s) (7) of Section 75 of the Bankruptcy Act was unconstitutional and therefore furnished no basis upon which the ultimate relief sought might be granted. The District Judge held against the mortgagee on the first ground, but sustained the second and denied the petition because in his opinion the sub-section of the Bankruptcy Act under which the petition was filed was violative of the "due process" clause of the Fifth Amendment. The petitioner has appealed.

There is no dispute as to the facts, which may be briefly stated as follows: On February 6, 1926, the petitioner William W. Bradford, Jr., a farmer of Harford County, Maryland, executed a mortgage on 145 acres of land to the Potomac Joint Stock Land Bank of Alexandria to secure a debt of $20,000. On April 16, 1934, there was due on the mortgage debt a balance of amortization payments in excess of $1,000 and certain insurance premiums which the mortgagee had advanced; and on that date the mortgagee, acting under the terms of the mortgage, declared the whole debt, amounting to $19,497.23, to be due, and assigned the mortgage to Michael W. Fahey for the purpose of foreclosure. Fahey proceeded to advertise and sell the mort-

gaged property under the power contained in the mortgage, docketing the foreclosure proceedings in the Circuit Court of Harford County, Maryland, in accordance with the provisions of the Maryland law. The sale was held on June 18, 1934, when John D. Worthington and wife became the last and highest bidders for the property at the price of $21,500 and deposited $2,150 with the assignee to be applied on the purchase price. On June 19th, Fahey reported the sale to the Clerk of the Court, and the usual order *nisi* was entered requiring notice to be given that the sale would be confirmed unless cause to the contrary should be shown on or before the 19th day of July. Exceptions to the sale were filed by the petitioner Bradford, but these have not been passed on because of the proceedings taken in this cause.

On July 17th, two days before the order *nisi* was returnable, Bradford filed his petition in the court below under Section 75 of the Bankruptcy Act, alleging that he was a farmer, that he was unable to meet his debts as they matured and that he desired to effect a composition or extension of his debts as provided by that section. The proceedings in the state court were stayed pursuant to the prayer of the petition, and the case was set for hearing on September 6th. In the meantime answers were filed by Fahey and the Worthingtons and the land bank was made a party. Letters were sent to the various creditors offering a composition, but on the morning of the hearing petitioner was notified that his offer would be refused by the land bank, and, as the debt owing to it was more than the other indebtedness of petitioner, there resulted a failure to obtain such an acceptance of the offer of composition as was required by the section. Petitioner thereupon amended his petition and asked to be adjudicated a bankrupt and granted relief pursuant to sub-section (s) of the section and that the foreclosure proceedings in the state court be permanently enjoined. At this time it was formally and definitely stated by counsel for petitioner that he would elect to purchase the property embraced in the land bank's mortgage pursuant to the terms prescribed in sub-section (s) and by counsel for the mortgagee that it did and would object

thereto. The court approved the petition as properly filed and passed an order adjudicating Bradford a bankrupt, but, being of opinion that paragraph 7 of sub-section (s) was unconstitutional, refused to stay proceedings in the state court. The matter complained of on this appeal is this refusal to stay proceedings.

A preliminary question which arises is whether the appeal is not premature, as the right of petitioner to relief under paragraph 7 of sub-section (s) of the act would arise only after there had been an appraisal of the property, an offer to purchase at the appraised price and a refusal on the part of the lienholder to accept this offer. But the answer to this is that the appeal is from the refusal to stay proceedings in the state court, and under the provisions of the act, if valid, these proceedings should be stayed while the appraisal and other proceedings preliminary to the right to relief under paragraph 7 are going forward, if the court has jurisdiction to stay such proceedings. Sub-section (s) is not an independent statute but an amendment to Section 75 as enacted by the Act of March 3, 1933. Under subsections (n) and (o) of that section, the property of the farmer wherever situate is subjected to the exclusive jurisdiction of the court of bankruptcy, and it is forbidden that proceedings for foreclosure of a mortgage thereon be instituted or maintained in any other court without the permission of the court of bankruptcy. Proceedings under sub-section (s) are but a continuation of proceedings theretofore instituted under other provisions of the section; and the provisions for staying foreclosure in a state court are clearly applicable for the purpose of protecting the court's jurisdiction while such proceedings are going forward. A denial of the stay on the ground that paragraph 7 of sub-section (s) was unconstitutional, after a petition had been filed asking relief under that sub-section, was clearly appealable, therefore, irrespective of whether or not the proceedings had gone forward to the point where petitioner was entitled to the relief provided by that paragraph.

With this preliminary question out of the way, three questions are raised for our consideration by the appeal, viz: (1) whether sub-section (s) of Section 75 of the Bank-

ruptcy Act, and particularly paragraph 7 thereof, is a constitutional exercise of the bankruptcy power of Congress; (2) whether a court of bankruptcy has jurisdiction under Section 75 of the Bankruptcy Act to stay proceedings for foreclosure of a mortgage already pending in a state court where relief is asked under sub-section (s) of the section; and (3) whether this jurisdiction may be exercised with respect to a foreclosure suit in Maryland, where there has been a sale of the mortgaged property under order of court but the sale has not been confirmed. We think that all of these questions must be answered in the affirmative.

The bankruptcy power of Congress is conferred by Art. 1, Sec. 8, Clause 4 of the Constitution, which provides that Congress shall have power "to establish . . . . uniform laws on the subject of bankruptcies throughout the United States". It is correlative to the clause of Art. 1; Sec. 10 which provides that "no state shall . . . . pass any . . . law impairing the obligation of contracts." It was realized at the time of the adoption of the Constitution that uniform laws on the subject of bankruptcies were important in the development of interstate and foreign commerce, over which Congress was given control; and not only was Congress vested with the power to establish such uniform laws, but the states were expressly forbidden to exercise the power usually involved in bankruptcy laws, i. e., the power of impairing the obligation of contracts. The subject is dealt with in one sentence in that great commentary on the Constitution, the Federalist Papers (XLI), where it is said: "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn in question."

What is a law on the subject of bankruptcies within the meaning of the Constitution has never received exact definition at the hands of the Supreme Court, but there can be no question, we think, but that the constitutional grant vests in Congress full power to deal with the relationship existing between debtors unable or unwilling to pay their

debts and their creditors, and that we may safely say, without attempted to delimit the power, that any law must be held to be a law on the subject of bankruptcies, which provides for the surrender of the property of a debtor to a court, its control and administration by the court with the eventual application of the property or its value to the claims of creditors, and the discharge of the debtor from the remainder of his debts. As we said in the recent case of *Campbell* v. *Alleghany Corporation* (C. C. A. 4th) — Fed. (2d) —, which dealt with the validity of the corporate reorganization section of the Bankruptcy Act, "all phases of the relationship between a debtor financially embarrassed and his creditors are brought under the control of Congress by the constitutional grant of power; and the fact that a particular mode has hitherto been employed in dealing with this relationship is not to be taken as a measure of the power over it. *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *In re Landquist* (C. C. A. 7th), 70 Fed. (2d) 929; *In re Klein*, Fed. Cas. No. 7865, reported as note to *Nelson* v. *Carland*, 1 How. 265, 277; *In re Reiman*, 7 Ben. 455, Fed. Cas. No. 11,673; *Kunzler* v. *Kohaus*, 5 Hill 317."

In *Story on the Constitution*, Sec. 1113, quoted with approval by Judge, later Mr. Justice, Blatchford, in *In re Reiman, supra*, it is said: "Perhaps as satisfactory a description of a bankrupt law as can be framed is that it is a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provisions for cases of persons failing to pay their debts."

And Judge Blatchford in his opinion in the case cited defines the "subject of bankruptcies" as used in the constitutional grant of power as follows: "What is 'the subject of bankruptcies?' It is not, properly, anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief. It comprises the satisfaction of the debt for a sum less than its amount, with the relief of the debtor from liability for the unpaid balance, and the right

of the creditor to require that the amount paid in satisfaction shall be substantially as great a pro rata share of the property possessed by the debtor as it can pay, or can reasonably be expected to pay."

It is clear that the power of Congress over bankruptcies is not limited by the terms of the British and colonial statutes as they existed at the time of the adoption of the Consitution. As was well said by Mr. Justice Hunt, in affirming the decree of Judge Blatchford in the *Reiman* case (Fed. Cas. 11,675): "The argument, that the subject of bankruptcies is to be interpreted and limited by the British and colonial statutes, as they existed at the time of the separation of this country from Great Britain, is quite too narrow. No country can afford to be thus cut off from all possible improvement in its legislation. Whatever relates to the subject of bankruptcy is within the jurisdiction of Congress; and, to say that the law as existing at the time of the Revolution, or the adoption of the Constitution, shall furnish the rule and limitation of legislation, would take a large part of the subject out of their jurisdiction. While it is true that all proper bankrupt laws and insolvent laws are based upon the theory of a surrender of the bankrupt's property, none of them require such surrender to be entire and absolute." See also opinion of the Supreme Court in *Hanover Nat. Bank* v. *Moyses, supra,* and opinion of this Court in *Campbell* v. *Alleghany Corporation, supra.*

Nor are the limits of the bankruptcy power to be sought in the exercise which Congress has made of that power. Congress made no exercise of the bankruptcy power whatever until 1800, when an act along the line of the English bankruptcy acts relating to traders was passed, which was repealed, however, in 1803. The power was again exercised by the passage of an act in 1841, but this act was repealed in 1843. In 1867 the third bankruptcy act was passed; and it remained in force for only eleven years, being repealed in 1878. In 1898 the present bankruptcy act was passed. It has been well described (1 *Remington on Bankruptcy* p. 18) as: "A system of laws for the taking possession of the assets of an insolvent, either upon his own initiative or, in case he has done certain acts called acts of bankruptcy, considered to demonstrate his unworthiness or incapacity

properly to continue his business, upon the initiative of his creditors; for recovering such of his assets as have been transferred fraudulently to third parties or unfairly to particular preferred creditors or have been seized by creditors while the debtor was insolvent; for selling the assets and distributing the proceeds equitably amongst his creditors; and finally for granting to him, in case he has surrendered all his assets and disclosed to his creditors in bankruptcy the truth about his business, a discharge from the unpaid deficit of his debts." But not even the act of 1898 fully covered the subject of bankruptcy. It made no adequate provision for extension of time to insolvents, for corporate reorganization, for relief of embarrassed railroad corporations or for relief of agricultual debtors. It was designed primarily for the relief of those whose debts had been incurred in mercantile and manufacturing pursuits and their creditors; and only in this field did it afford relief which could be said to be adequate.

In 1933, however, a much wider exercise of the bankruptcy power on the part of Congress became imperative. The period of industrial expansion which followed the world war witnessed an unprecedented expansion of credit througout the country. Bonds were issued by both public and private corporations in amounts far beyond any ability on their part to pay in normal times, and private individuals borrowed on real estate mortgages to an extent that had never before been thought possible. This period of prosperity and expansion of credit had been followed by an economic depresssion world wide in scope, property values had dwindled to a mere fraction of what they had been, and the national income had shrunk to the extent that the payment even of the interest on this vast volume of indebtedness was out of the question. Relief was needed in the form of bankruptcy laws, which would enable the people to face reality with respect to the altered condition of their debt structure and would enable business to go forward unhampered by obligations which were impossible of fulfillment. Congress accordingly passed the amendment of March 3, 1933, to the Bankruptcy Act, 47 Stat. 1467. This amendment added four sections to the act: Section 74, which provided for compositions and extensions by distressed

debtors without an adjudication of bankruptcy; Section 75, which provided a special plan for the relief of agricultural debtors; Section 76, which granted relief to persons secondarily liable on obligations of distressed debtors; and Section 77, which provided for the reorganization of insolvent railroads. Sections 74 and 77, as thus enacted, have been sustained, as a valid exercise of the bankruptcy power. *In re Landquist* (C. C. A. 7th) 70 Fed. (2d) 929; *In re Chicago R. I. & P. R. Co.* (C. C. A. 7th) 72 Fed. (2d) 443.

It was soon apparent, however, that the amendments of 1933 did not adequately meet the situation. Something was needed which would enable insolvent corporations and farmers to obtain relief from their debt burdens without forcing a sale of their property, and, in the case of farmers, without putting them off of the land which they had been cultivating to join the army of the destitute and unemployed. Congress accordingly, on June 7, 1934, passed the Corporate Reorganization Act, as Section 77b of the Bankruptcy Act, and on June 28, 1934, passed the Frazier-Lemke Act adding sub-section (s) to Section 75 of the Bankruptcy Act. Both of these acts provide relief in bankruptcy for embarrassed debtors and their creditors under the supervision of the court without requiring a sale of the property of the debtor. We have recently passed the Corporate Reorganization Act and have held it valid. *Campbell v. Alleghany Corporation, supra.*

Both Section 75 as originally enacted and the Frazier-Lemke Act, adding sub-section (s) thereto, are emergency legislation, enacted to meet the conditions brought about by the economic depression. Sub-section (c) of Section 75 limits the time within which petitions may be filed thereunder to five years, and the provisions of sub-section (s), the Frazier-Lemke Act, are applicable only to debts existing at the time of its passage. As originally enacted the section provided merely for extensions and compositions for agricultural debtors, when accepted by a majority in number and amount of the claims against them, and when approved by the court as for the best interest of all creditors and as including an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the

farmer. See sub-sections (g) and (i). Compositions and extensions thereunder did not "reduce the amount of nor impair the lien of any secured creditors" but affected "only the time and method of its liquidation". Sub-section (k). There can be no question but that under the principles discussed by us in *Campbell* v. *Alleghany Corporation, supra,* the section as originally enacted was valid.

Sub-section (s), added by the Frazier-Lemke Act, provides for cases where a farmer who has filed a petition under Section 75 has failed to obtain the acceptance by creditors of an extension or composition proposal offered, or who may feel aggrieved by the composition or extension as finally approved. Such farmer is authorized to amend his petition or answer so as to ask that he be adjudged a bankrupt. Provision is then made, under paragraphs (1) to (6) of the sub-section, for the valuation of his property by appraisers, subject to review by the court, and for the purchase by him of all or any part of the property at the valuations so fixed, upon making payments which are spread over a period of six years. As the right of the farmer to purchase the property under these sections is dependent upon the consent of lienholders, and as the lienholder here has not given such consent, the validity of these purchase provisions is not before us. Upon the principles hereafter discussed, however, we see no reason to doubt their validity. Where a secured creditor objects to the sale to the farmer in accordance with these provisions, however, provision is made under paragraph (7) that proceedings be stayed, that the farmer have the right to retain possession of the property for five years upon paying a reasonable annual rental to be fixed by the court, and that he have the right to purchase the property at any time within the five years upon paying the appraised price of the property, with the right on the part of the lienholder to demand a reappraisal of the property and payment of the amount thereof in lieu of the amount of the original appraisal, if it is acceptable to him. Paragraph (1) of the sub-section relating to appraisal of the property of the bankrupt and paragraph (7), upon which the rights of the petitioner here depend are as follows:

"(1) Upon such a request being made in the petition or answer, at the time of the first hearing, appraisers shall be designated and appointed. Such appraisers shall appraise all the property of the debtor at its then fair and reasonable value, not necessarily the market value at the time of such appraisal. The appraisals shall be made in all other respects, with right of objections, exceptions, and appeal, in accordance with this Act: *Provided,* That in case of real estate either party may file objections, exceptions, and appeals within one year from date of order approving the appraisal."

"(7) If any secured creditor of the debtor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for, then the court, after having set aside the debtor's exemptions as prescribed by the State law, shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into Court the appraised price of the property of which he retains possession: *Provided,* That upon request of any lien holder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act: *Provided, however,* That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective."

As the paragraphs which we have quoted are amendments of the general bankruptcy law, it is clear that the

appraisals for which provision is made are to be conducted as are other appraisals in bankruptcy under the supervision and approval of the court, with the added safeguard that, in the case of real estate, objections, exceptions and appeals may be filed within one year of the order approving the appraisal. The price at which the farmer may purchase the property, therefore, is not some arbitrary figure arrived at by friendly appraisers, as has been argued, but the fair and reasonable value of the property as determined by the court in a judicial proceeding after notice and hearing. The appraisal is to be made of the property "at its then fair and reasonable value, not necessarily the market value at the time of such appraisal." Congress doubtless realized that, as a result of the economic depression, much valuable farm property had little or no market value at the time, and that it would be unfair to creditors to value the property on the basis of its then market value. In arriving at its fair and reasonable value, the appraisers and the court were authorized to take into consideration all the circumstances bearing upon value, not merely the market value at the time of the appraisal, just as a public service commission may consider such circumstances in valuing property for rate making purposes. The cost of the property, the cost of improvements made upon it, its depreciation, its productive capacity, reproduction cost or the cost of acquiring like property, the history of values in the immediate locality—all of these and other like matters, as well as market value, would be proper subjects of consideration in determining fair and reasonable value. The rule prescribed is eminently fair to creditors, as it is hardly conceivable that a court would approve an appraisal as a fair and reasonable value which was less than market value. And the danger that the farmer might avail himself of the provisions of the act to speculate upon the chances of a rise in the value of the property without obligating himself to purchase it, is obviated by the provision which allows the lienholder to demand a reappraisal. If the farmer elects to purchase, he must pay either the original appraisal or this reappraisal, whichever is higher.

It is of course no ground of constitutional objection that the section here in question relates only to farmers; for it is well settled that the uniformity prescribed by the Constitution is "geographical and not personal" and that bankruptcy legislation need not apply to all classes of persons in the same way. *Hanover Nat. Bank* v. *Moyses, supra,* 186 U. S. 181, 188; *Stellwagen* v. *Clum,* 245 U. S. 605, 613; *Leidigh Carriage Co.* v. *Stengel* (C. C. A. 6th) 95 Fed. 637; *In re California Pac. Ry. Co.,* 3 Sawyer 240, Fed. Cas. No. 2,315; *Campbell* v. *Alleghany Corporation, supra.* And it does not furnish ground of objection that secured debts are affected, or that property which has been mortgaged by the bankrupt is to be administered by the bankruptcy court. Under the bankruptcy law as it existed prior to the recent amendments the court in ordering the sale of the bankrupt's property free of liens administers his encumbered property, as well as that which is unencumbered. See *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 227; *Federal Land Bank of Baltimore* v. *Kurtz* (C. C. A. 4th) 70 Fed. (2d) 46; *Allebach* v. *Thomas* (C. C. A. 4th) 16 Fed. (2d) 853. "A secured debt or lien is, so far as the Constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt, • • • and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies." *In re Burgh,* 7 Fed. Supp. 184, 185; *Campbell* v. *Alleghany Corporation, supra.*

The case, then, comes to this: Whether the act is to be condemned as not being in fact a law on the subject of bankruptcies or as denying the due process guaranteed by the Fifth Amendment, either because it permits the farmer to purchase the encumbered property at the valuation fixed by the court instead of requiring that it be sold at public auction, with right on the part of the lienholder to bid at the sale, or because it permits a delay of five years, during which the proprty is to be rented to the farmer, before requiring that the value as determined by the court be collected and distributed to lienholders and other creditors.

There can be little doubt as to the law being a law on the subject of bankruptcies within the meaning of those words as used in the Constitution. It applies only to farmers who are unable to pay their debts and ask to be adjudged bankrupt. It requires the surrender of their property into the control of the court of bankruptcy. It provides for the valuation of this property and that such valuation be paid to creditors. It grants to the bankrupt a discharge from his debts. That the property of the bankrupt is to be operated under the direction of the court until such time as it can be disposed of to advantage is, of course, not inconsistent with the purposes of a bankruptcy act; and there is nothing in the nature of bankruptcy which requires that the debtor's property be actually sold and the proceeds thereof distributed among creditors. If the creditors receive the value of the property, they have received all to which they are reasonably entitled. The corporate reorganization act rests on this basis; and there is no reason why Congress should not apply the same principles to the relief of insolvent farmers. See discussion of this question as applied to corporate reorganization in *Campbell* v. *Alleghany Corporation, supra.*

Of course, a bankruptcy law must not offend against the due process clause of the Fifth Amendment, which is a limitation upon all of the powers conferred by the people upon the Federal Government. *Hanover Nat. Bank* v. *Moyses, supra.* But as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not to be taken as in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be "incompatible with fundamental law"; and, when consideration is given to the situation which confronted Congress at the time of the passage of the act, we do not think that its provisions can be said to violate this rule. The situation, which still continues in large measure, was that agriculture throughout the United States was prostrate and despairing. A huge volume of debt, estimated at between eight and ten billions of dollars, had been piled up by the farmers in the period of expansion, and this was represented in large part

by mortgages on land. As a result of the decline in the prices of agricultural products, the farmers were without means to pay even the interest on this huge volume of debt, and there was default throughout the country on agricultural mortgages. Foreclosures on an unprecedented scale were imminent; but such foreclosures, while fraught with ruin to the farmer debtors, would not have resulted in payment of the debts, as land had so declined in value that only in rare instances could it be sold for anything like the amount of the debt against it. To have permitted these foreclosures to proceed would have meant the purchasing of the land by the lienholders, the eviction of owners who were settled on the land and a great increase in tenant farming. It was in the public interest that the farmer be kept on his farm, that, if possible, his interest as an owner of the farm be maintained, and that its value as a going concern be preserved.

It was to meet this emergency situation that the statute in question was enacted. The interests of the creditor were protected by having the property valued under the direction and subject to the approval of the court, and by providing that the creditor should ultimately receive this valuation. The farmer was kept on the farm and its value as a going concern was preserved by providing that it should be rented to the owner at a rental to be fixed by the court, and that he should have the right to purchase it at the fair and reasonable value which the court should determine.

The operation of mortgaged property under the control of the court is, of course, nothing new. It is a common thing for foreclosure proceeding to be delayed while the court operates the property of debtor corporations for the purpose of preserving its going concern value in the interest of stockholders as well as creditors until a sale can be advantageously made; and it should not be held "so grossly arbitrary and unreasonable as to be incompatible with fundamental law" that Congress, when faced with a great economic emergency, has prescribed for the relief of agricultural debtors and their creditors, a procedure which involves the operation of agricultural property under the supervision of the court to the end that its value may be

preserved in the interest of all parties concerned. The fact that the court is to rent the property, instead of operating it through a receiver, is a difference of detail in management and not a difference in principle.

And the right accorded the farmer to purchase at the valuation fixed by the court, is no more than the right accorded the debtor under the corporate reorganization act which we have upheld. If the creditor receives the value of the property, it is no concern of his who the purchaser may be; and as we have seen, the act provides for the determination of value by the court in a judicial proceeding in which the creditor is given full opportunity to be heard.

As a matter of fact, no property in any real sense is taken from the lienholder by reason of the provisions of the act. The mortgaged property has already shrunk in value before the proceedings under the act are instituted; and the proceedings merely scale down the secured portion of the debt to the value of the encumbered property and transfer the lien of the encumbrance to the proceeds of that property when paid into court. While the lienholder is delayed in getting his money, the delay is probably not for so long a time, or the loss so great, as would result to him if the act were not passed and wholesale foreclosures of real estate mortgages should result. While generally regarded as a measure for the relief of farmer debtors, it is clear that the act is at the same time one in the interest of their creditors also; for creditors of farmers would have nothing to gain, even with respect to the collection of their debts, from the financial debacle which would result from the wholesale foreclosure of farm mortgages, in which their collateral would be rendered practically worthless. In this connection, it may not be amiss to consider the closing paragraphs of the report of the Senate Judiciary Committee, reporting on the act. (Report No. 1215, 73rd Congress, 2d Session.) They are as follows:

"In short, all that this amendment does is to carry out the purpose of section 75 and adjust and scale down existing farm indebtedness to the present value of his property, and it gives the debtor farmer an opportunity to save his home and maintain his property by paying for it on the

installment plan while the property remains under the control of the court. Section 75 itself is an emergency act and has only about 3½ years to run. Therefore this amendment will cease to exist when the time limit of section 75 expires.

"This amendment will make it possible for the Federal Farm Credit Administration, through the Federal land banks, to function by adjusting and scaling down the indebtedness to somewhere within the reasonable value of the property. This amendment in no way affects existing liens or encumbrances except that it scales them down to the present value of the encumbered property, and then transfers the lien or liens to the proceeds of that property when paid into court.

"On the average, under its provisions, the lienholders and creditors of the debtor farmer, on a whole, will receive unquestionably larger returns than under the present system where the property is thrown upon the market and sold at public auction. It gives a reasonable time and gives the original owner an opportunity to protect his property, and therefore his home."

If the states, as has been held in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, may in times of emergency exercise their police power to grant a moratorium against the foreclosure of mortgages, notwithstanding the limitations of the contract clause of the Constitution, then certainly Congress, which has been given express power upon the subject of bankruptcies, may exercise that power in the enactment of bankruptcy laws designed to meet the emergency, even though the exercise may delay the collection of the debts due by the bankrupt. As has been often said, the bankruptcy power, like the other powers granted to the federal government, is plenary. It is to be used, as are the other granted powers, to "promote the general welfare". And in times of emergency it should be exercised, reasonably of course and in the spirit of the Constitution, but in a way, if possible, to meet the problems of the emergency. As said by the Chief Justice in the Blaisdell case: "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Al-

though an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' *Wilson* v. *New*, 243 U. S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."

The most serious question presented is as to the five year delay which the statute interposes to the rights of the creditor. It may be conceded that under ordinary conditions, this provision would be so arbitrary and unreasonable as to offend against the provisions of the Fifth Amendment; but we are not prepared to say that it may be so condemned when viewed in the light of the emergency which confronted Congress. Whether after the economic depression shall have passed and conditions shall have returned to normal the act can be sustained, is a question which is not before us; but the law is well settled that "it is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Building & Loan Association* v. *Blaisdell, supra*, 290 U. S. 398, 442; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547, 548.

The act in question has been upheld as constitutional by the Circuit Court of Appeals of the Sixth Circuit in *Louisville Joint Stock Land Bank* v. *Radford* (C. C. A. 6th) — Fed. (2d) —; by Judge Dawson in the same case in the District Court 8 Fed. Supp. 489; by Judge Symes in *In re Cope*, 8 Fed. Supp. 778; and by Judge Atwell in *Paine* v. *Capitol Freehold Land Co.*, 8 Fed. Supp. 500.

We come then to the question as to whether the court of bankruptcy had jurisdiction to stay proceedings for foreclosure of a mortgage already pending in a state court; and it is clear that prior to the enactment of the amendment of March 3, 1933, it had no such power. *Straton* v. *New*, 283 U. S. 318; *In re Hurlock*, 23 Fed. (2d) 500. This was because the jurisdiction of the state court and the bankruptcy court in matters of foreclosure was concurrent, and on principles of comity the bankruptcy court would not attempt to interfere with the jurisdiction of the state court. Under sub-section (n) of Section 75, however, the bank-

ruptcy court was given exclusive jurisdiction over the property of the farmer debtor; and under sub-section (o) it was expressly provided that proceedings for the foreclosure of mortgages should not be instituted, or, if instituted prior to the filing of the petition, should not be maintained. Under such circumstances there can be no question but that the jurisdiction of the bankruptcy court over the property was paramount and exclusive, and that it was the duty of the court to protect this jurisdiction by injunction or other appropriate process. In such case the power of the court is analogous to that which it possesses where the property of the bankrupt is in possession of the receiver of a state court appointed within four months of the filing of the petition in bankruptcy. See *In re Watts*, 190 U. S. 1; *Bailey* v. *Blackmon* (C. C. A. 4th), 14 Fed. (2d) 16, 19, 20; *Gamble* v. *Daniel* (C. C. A. 8th), 39 Fed. (2d) 447; *Miller* v. *Potts* (C. C. A. 6th), 26 Fed. (2d) 851.

It is argued that the power of the court of bankruptcy to stay proceedings ended with the rejection of the proposition for composition or extension submitted under Section 75 as originally enacted. This, however, fails to take account of the fact that sub-section (s), the Frazier-Lemke Act, is a mere addition to Section 75 of the Bankruptcy Act, and that the procedure provided for thereunder is merely a continuation of the procedure which must be begun under other subsections of Section 75. For the court to afford the relief which the section as amended contemplates, it is necessary that the exclusive and paramount jurisdiction of the court over the property of the bankrupt be maintained; and there can be no question but that the provisions of sub-sections (n) and (o) apply as well to proceedings continued under sub-section (s) as to proceedings under the other provisions of Section 75.

And we do not think that the right to stay proceedings in the state court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale. Of course, where the property of the bankrupt has finally passed from him under a foreclosure proceeding, the bankruptcy court has no power over it; for the bankruptcy court is given jurisdiction only over property of the

bankrupt, and, when he has ceased to have an interest in the property as the result of foreclosure, no basis exists for a stay of proceedings under the act. *In re Arend*, 8 Fed. Supp. 211, 212; *In re Klein*, 9 Fed. Supp. 57, 59; *In re Stacy*, 9 Fed. Supp. 61; *In re Smith*, 7 Fed. Supp. 863. Under the law of Maryland, however, the defendant in foreclosure does not lose his interest in the property sold at foreclosure sale until the same is confirmed and the purchase money paid. It is provided by the Maryland Code (Art. 66, Sec. 11) that "all such sales when confirmed by the court and the purchase money is paid, shall pass all the title which the mortgagor had in the said mortgaged premises at the time of the recording of the mortgage." Until confirmation and payment of the purchase money, the property is still in the mortgagor and the only interest acquired by the purchaser is the right to receive a conveyance upon complying with the terms of sale if the sale be confirmed. In the latest case dealing with the subject, *Mizen* v. *Thomas*, 156 Md. 313, — Atl. —, the Court of Appeals of Maryland said:

"It is true that, where in such a case as this the trustee reports a sale which in due course is finally ratified, the transaction is spoken of as a sale, and for many purposes it may be treated as a sale, and no mischief is occasioned by that use of the word. *Miller's Equity Proc.*, sec. 512. But strictly speaking it is not a sale, for a sale of real estate is not complete or consummate until the property has been actually conveyed, or at least until the purchaser has so far complied with the terms of sale as to entitle him to a conveyance. The bid of the purchaser, its acceptance, the report of the trustee, and its final ratification by the court, are all successive steps in the formation and completion of a perfect and binding contract of sale, but do not amount in themselves to an actual sale. Nor can the property be treated as actually sold until the terms of sale have been met or waived, and the purchaser has received or is entitled to receive a conveyance thereof. For until then the title to the property is still in the mortgagor, and the only interest acquired by the purchaser is the right to receive a conveyance of the property upon complying with the terms of sale."

While there are some expressions to the contrary in the opinion in *Union Trust Co.* v. *Biggs*, 153 Md. 50, 137 Atl. 509, that case merely decided that a judgment against the defendant in foreclosure, rendered after the sale but before its confirmation, did not constitute a lien upon the property sold; and it is to be interpreted, in our opinion, as relating the effect of the confirmation to the date of the sale, rather than as changing the well settled rule as to the effect of judicial sales on the rights of the parties prior to confirmation. See *Whiteley* v. *Whiteley*, 117 Md. 538, 544; *Loft Inc.* v. *Seymore*, 148 Md. 638, 645. But at all events, the decision in *Mizen* v. *Thomas*, *supra*, is the latest expression of the Maryland court and we accept it as laying down the rule now in force in that state.

As the bankrupt had not lost his rights in the mortgaged property as a result of the unconfirmed foreclosure sale, we think that the foreclosure proceedings should have been stayed. The statute is highly remedial in character and should be liberally construed. The evident purpose of Congress was to grant to farmer debtors the relief which it prescribes in all cases where an interest in their property remained in them at the time of the filing of petitions under the act. See *Paine* v. *Capitol Freehold & Land Co.*, 8 Fed. Supp. 500; *In re Lawmon*, 8 Fed. Supp. 886; *In re Cope*, 8 Fed. Supp. 961; *In re Mines*, 9 Fed. Supp. 1; *In re Duffy*, 9 Fed. Supp. 166. As said by Judge Lindley in the case last cited:

> "Viewing the bankruptcy amendmentin connection with the remaining sections of the Bankruptcy Act and the recent amendments thereto, it seems to me evident that Congress intended to reach every kind of property interest or property right which the bankrupt then had, including rights to redeem; that Congress intended that the bankrupt should have an opportunity to preserve the then existing status of foreclosure or other insolvency proceedings until it can be determined whether any rehabilitation is impossible. This does not mean that Congress has said that mortgages shall not be enforced. It does not mean that liberty of contracts shall be interfered with or property

confiscated, but it does mean that the court, within its jurisdiction and within the limits announced by the Supreme Court in the recent case of *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, will preserve the existing status of property rights of the bankrupt until convinced that no good purpose is being served by so doing."

For the reason stated, we think the learned judge below erred in denying the prayer of the petition for stay of proceedings in the state court. The order appealed from will accordingly be reversed and the case will be remanded for further proceedings not inconsistent with this opinion. As appeal to superintend and revise under Section 24 (b) of the Bankruptcy Act is the proper method of review, the order appealed from will be reversed in No. 3778 and the appeal in No. 3797 will be dismissed.

In No. 3778 Reversed.

In No. 3797 Appeal Dismissed.